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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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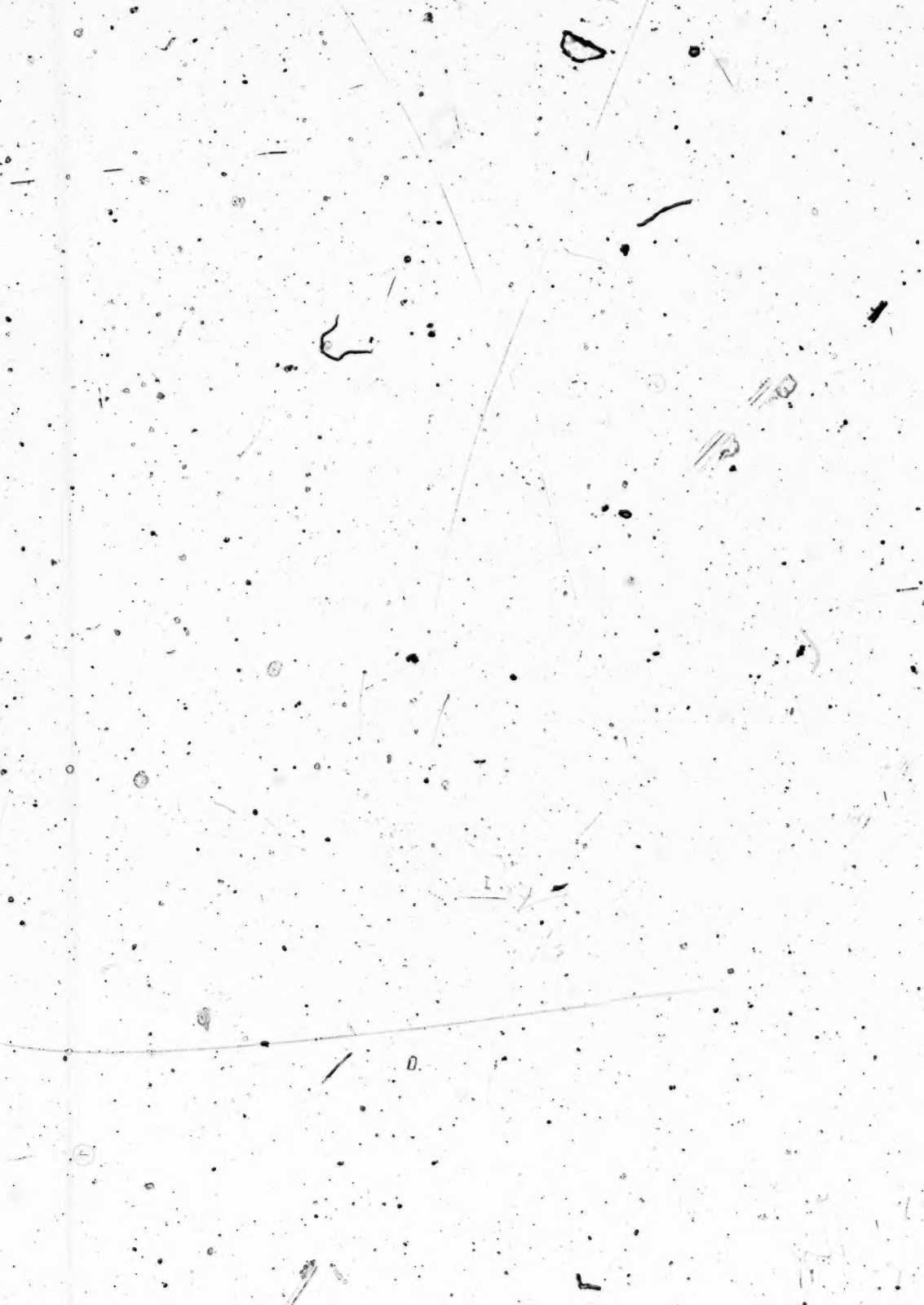

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, SOUTHERN PACIFIC COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY, THE COLORADO AND SOUTHERN RAILWAY COMPANY, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, GREAT NORTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, ATLANTIC COASTLINE RAILROAD, RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, GULF, MOBILE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, THE FORT STREET UNION DEPOT COMPANY, JACKSONVILLE TERMINAL COMPANY, GEORGIA RAILROAD, THE PENNSYLVANIA RAILROAD, THE BALTIMORE & OHIO RAILROAD COMPANY, CENTRAL VERMONT RAILWAY, INC., DETROIT TERMINAL RAILROAD COMPANY, MONON RAILROAD, THE WASHINGTON TERMINAL COMPANY, individually and as representative of certain other carriers, RALPH T. SEWARD, individually and as representative of Arbitration Board No. 282, ROBERT F. KENNEDY as Attorney General of the United States, and the UNITED STATES, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Locomotive Engineers prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 20, 1964, Court of Appeals Nos. 18,333 and 18,334.[1]

OPINIONS BELOW

The per curiam opinion of the Court of Appeals and the opinion of Judge J. Skelly Wright, concurring in part and dissenting in part, have not yet been officially reported and are printed in Appendix H, *infra*, pp. 25a-28a. They are unofficially reported at 55 LRRM 2517. The decision of the district court is reported in 225 F. Supp. 11 (1964) and is printed in the Consolidated Joint Appendix (JA 368 *et seq.*).[2]

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1963 (R. 690), and is printed in Ap-

[1] By an order entered January 16, 1964, the Court of Appeals consolidated these two cases with case numbers 18,331 and 18,332, brought by the Brotherhood of Locomotive Firemen & Enginemen, *et al.*, against the same respondents (R. 410). The consolidation was for all purposes (R. 410). A petition for a writ of certiorari in these other cases is before this Court in No. 935.

[2] "JA" denotes the "Consolidated Joint Appendix" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court in Case No. 935. "Tr." denotes the transcript of testimony before Arbitration Board No. 282 which, together with the exhibits there introduced, has been filed with the Clerk of this Court in Case No. 935. "R" denotes the record certified by the Clerk of the Court of Appeals and filed in this Court as the record in the instant case.

pendix I, *infra*, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[3]

QUESTIONS PRESENTED

1. Whether, upon a Congressional finding that emergency measures were necessary to prevent a threatened interruption of essential transportation service as a consequence of a dispute concerning future terms and conditions of employment, a federal statute, Public Law 88-108, as construed and applied, was consistent with Article I and the Fifth Amendment to the Constitution of the United States in terminating the right of the disputing parties to economic self-help and in compelling them to accept the determinations of an *ad hoc* board, consisting mainly of some of the contending parties, as to the extent to which their existing agreements and the existing seniority rights of employees should be abrogated and as to the terms and conditions which should govern their relations for a term of years thereafter, the said board claiming

[3] Judge Wright, in his separate opinion below, expressed the view that Section 9 of the Railway Labor Act foreclosed review by this Court of judgments of the Court of Appeals in proceedings to impeach arbitration awards (*infra*, p. 28a). However, the legislative history of 28 U.S.C. § 1254(1) establishes that it empowered this Court to review such judgments. Section 13 of the Railway Labor Act as enacted in 1926 amended the Judicial Code to make judgments entered by circuit courts of appeals in Section 9 proceedings reviewable by certiorari (pp. 17a-18a, *infra*). The 1940 amendments to the Judicial Code listed Section 9 of the Railway Labor Act among the sections under which cases in the circuit courts were reviewable by certiorari (p. 19a, *infra*). In the 1948 amendments to the Judicial Code (p. 19a, *infra*), listing of specific sections was dropped because Section 1254 "applies to any case in the circuit court of appeals." H. Rep. No. 308, 80th Cong., 1st Sess., on H.R. 3214, p. A236. Hence 28 U.S.C. § 1254(1) empowers this Court to review by certiorari all issues in this case.

and exercising the authority and discretion, in making these determinations, to depart radically from existing terms and conditions and those under consideration in negotiations and mediation.

2. Whether, consistently with Article I and the Fifth Amendment to the Constitution of the United States, in federal compulsory arbitration legislation to settle a dispute over the content of a prospective private agreement and in an award under such legislation, alterations of the pre-existing rights of the parties may be imposed beyond the extent necessary to bridge the gap realistically remaining between the parties.

3. Whether Public Law 88-108, providing for compulsory arbitration, invalidly attempted to delegate legislative power and deprive petitioner of rights without due process of law, in that, as construed and applied below, it did not provide guidance as to legislative policy and standards adequate to govern the decision of Arbitration Board No. 282 on the matters at issue, including the key issue as to what categories of assignments locomotive engineers should be required to work without engine service assistants ("firemen").

4. Whether Public Law 88-108, as construed and applied below, could, consistently with the provisions of Article I and the Fifth Amendment to the Constitution of the United States, authorize an *ad hoc* compulsory arbitration board to provide for the settlement of a dispute over terms and conditions of employment to apply to locomotive engineers and their engine service assistants ("firemen") by redelegating to some of the disputing parties, namely, first to the employing carriers and thereafter, to a lesser degree, to local

chairmen representing the assistants, full authority and responsibility for the interpretation and application of the language of the statute dealing with the safety, burden of work, and other important interests of the locomotive engineers, said redelegation being in general terms without clarifying instruction, without provision for supervision or subsequent review, the petitioner, as representative of locomotive engineers, being deprived of the right to participate in creating the new working conditions, of the right to be heard concerning them, and of the right, for a period of years, to bargain for a modification of the procedure or results.

5. Whether a compulsory arbitration board having concluded that a certain number of assignments require the continued employment of locomotive engineer's engine service assistants ("firemen") based on various considerations, i.e., to prevent excessive safety hazards to lives and property, to avoid imposing an undue burden on the remaining crew members, and to assure adequate and safe transportation service to the public, but having made no finding that the conditions underlying such considerations obtain with substantial uniformity in the more than one thousand seniority districts covered by the award and having before it substantial uncontradicted evidence of a high degree of variability in the conditions underlying such considerations among the seniority districts, its award, in permitting carriers the right to abolish the jobs of every such assistant subject only to a uniformly limited veto of not more than ten per cent in any seniority district, including those in which there are fewer than ten jobs or in which there are more than ten but fewer than twenty jobs, is so irrational, arbitrary, and op-

pressive as to contravene the requirements of due process.

6. Whether a compulsory arbitration statute, as construed and applied below, and a proceeding thereunder by an *ad hoc* board, composed mainly of partisans, afforded due process and the statutory protections of the Administrative Procedure Act to the petitioner in reducing employees' seniority rights, curtailing their job opportunities, and terminating their collective bargaining rights as to working conditions, without providing an opportunity to frame the issues and to present closing arguments and briefs on the entire record of the statutory hearing conducted by the board; without informing the petitioner of the findings or order proposed and affording petitioner an opportunity to be heard either in writing or orally as to the absence of a factual or legal basis therefor or as to policy reasons calling for the rejection of the findings or order proposed; without subsidiary findings on the record to support ultimate conclusions; without findings of any kind by a majority of the board; in reliance upon non-existent and inapplicable conclusions of other bodies; and with no opportunity for an independent judicial review.

7. Whether a single district court judge had jurisdiction to decide an action brought by petitioner for injunctive relief against the enforcement and operation of a compulsory arbitration statute, Public Law 88-108, as being repugnant to Article I and the Fifth Amendment to the Constitution of the United States.

8. Whether, with respect to the key issue in dispute, i.e., the number and types of locomotive engineers' assignments which should be run with and without

engine service assistants ("firemen"). Arbitration Board No. 282 was authorized to make a compulsory arbitration award which did not preserve, prefer, and complete the pattern of results reached through collective bargaining; which did not incorporate, relate to, or give any weight to terms and conditions that the parties had indicated in bargaining and mediation would be and might be acceptable to them; which did not reflect any narrowing of the areas of disagreement between the parties achieved during bargaining and mediation; and which made no use of and gave no effect to the report of the Secretary of Labor, duly furnished to the board pursuant to Sections 1 and 3 of the statute, setting forth the extent, item by item, to which the parties were in agreement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Public Law 88-108, 45 U.S.C.A., Supp. 1963, § 157, 77 Stat. 132, is set forth in Appendix B, *infra*, at pp. 1a-5a. The relevant provisions of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, 44 Stat. 577, 48 Stat. 1185, are set forth in Appendix C, *infra*, pp. 5a-17a. Section 13 of the original Railway Labor Act (1926), 44 Stat. 577, 587, is set forth in Appendix D, *infra*, p. 17a. The provisions of 28 U.S.C. § 1254 (1), 62 Stat. 928, together with earlier statutes showing the relevant legislative history, are set forth in Appendix E, *infra*, pp. 18a-19a. The provision of 28 U.S.C. § 2282, 62 Stat. 968, is set forth in Appendix F, *infra*, p. 20a. The Administrative Procedure Act, 5 U.S.C. § 1001 *et seq.*, 60 Stat. 237, is set forth in Appendix G, *infra*, pp. 20a-24a. The relevant provisions of Article I and the Fifth Amendment to the Constitution of the United States are set forth in Appendix A, *infra*, p. 1a.

STATEMENT

Origins of the Dispute

This case arises from a difference in philosophy between management of the railroad carriers and the labor unions representing the operating employees of the railroads[4] concerning the role of collective bargaining in creating and modifying the working conditions of railroad employees. By notices served on the railway operating unions (including the petitioner) on November 2, 1959, management of most of the country's railroads demanded the abrogation of all agreements national or local, governing the basic working conditions of the employees (Car. Exh. 7, pp. 20-39, Tr. 75, 273; 279; Em. Exh. 6-A, p. 10, Tr. 1863, 1877). These notices sought for management the unrestricted right to determine unilaterally (and thereafter from time

[4] These employees include locomotive engineers (sometimes referred to as "enginemen") and their engine service assistants ("firemen"), conductors and trainmen, brakemen and switchmen. There are five labor unions representing such employees. Petitioner, the Brotherhood of Locomotive Engineers, commonly referred to as the BLE, represents engine service employees, notably locomotive engineers, on most properties involved in this dispute (Tr. 2427-2428); it also represents assistants to locomotive engineers ("firemen") on some properties in this dispute (Em. Exh. 6-B, p. 1; Tr. 1863, 1877). Conversely, the Brotherhood of Locomotive Firemen and Enginemen, commonly referred to as the BLF&E, represents most assistants to locomotive engineers; on some properties it also represents locomotive engineers. The duty of the "fireman" is to assist the engineer (Em. Exh. 7, p. 140, Tr. 2106, 2109; Em. Exh. 28, p. 2, Tr. 2447, 2494; Em. Reb. Exh. 14, pp. 8, 16; Car. Exh. 8, pp. 45, 219, Tr. 273, 279). All locomotive engineers formerly served as assistants and frequently locomotive engineers are bumped back into jobs as assistants as a result of fluctuation in business and of the high rate of productivity growth which results in more tonnage hauled at a faster speed by fewer engineers. (Tr. 2427-8; Em. Exh. 6-B, p. 1, Tr. 1863, 1877; Em. Exh. 6-A, p. 2, Tr. 1863, 1877; Em. Exh. 13, pp. 3-4, 6, 8, Tr. 2307, 2368).

to time to change as management might see fit), without collective bargaining and without reviewability, the territorial extent which a single crew might be required to run and the extra duties they might be required to perform en route (Car. Exh. 7, pp. 26-28, Tr. 273, 279). While seeking to add to the locomotive engineer's work content without restriction except by the 16-hour law, management also sought the unrestricted right to remove the locomotive engineer's assistant ("fireman") from all engine service assignments other than on passenger trains and to change the consist of train service crews (JA 39).[5] Further, the carriers proposed to cut mileage rates of pay by some 37 percent and to eliminate payments for non-mileage tasks performed by employees compensated solely on a mileage basis[5] (Em. Exh. 6-A, p. 12; Tr. 1863, 1877; Car. Exh. 8, p. 101, Tr. 273, 279).

The unions did not accede to these extraordinary demands. Instead, on September 7, 1960, they served notices of their own under the Railway Labor Act. (Car. Exh. 7, pp. 67-69, Tr. 77, 273, 279). These notices, together with implementing proposals, served by petitioner as well as by other unions (Car Exh. 2, pp. 24-46, Tr. 13, 18, 273, 279), demanded the maintenance of a full crew (including one locomotive engineer and one assistant to the locomotive engineer on each train),[6] premium pay for overtime

[5] It should be noted that operating rules are not at all in issue between the parties. Operating rules are rules which are provided by management for the governance of operations of trains and equipment.

[6] This does not mean one engineer and one assistant on each locomotive unit. Typically, an assembled locomotive consists of three or more units of locomotive power (sometimes 10 or 12 units) pulling 75 or more freight cars (frequently 200 or more cars).

hours, paid holidays, compensation for meals and lodgings when waiting without pay for a return assignment at the terminal, and other elements of modernization of working conditions.

Contract Negotiations and Mediation Prior To Passage of Public Law 88-108

By agreement, all issues in dispute were submitted for nonbinding recommendations and mediation by the Presidential Railroad Commission (PRC). After a prolonged adversary proceeding, conducted without a statutory basis, without the swearing of witnesses, without the framing of issues in accordance with any statement of policy or applicable standards, the PRC issued a majority report containing its nonbinding suggestions for the negotiation of an agreement.[7] (Car. Exh. 8, Tr. 81, 273, 279).

The public members of the Commission were gravely concerned with what they regarded as the "moribund" state of the industry (Car. Exh. 13, p. 5, Tr. 93, 96-97, 273, 279). The PRC failed in its purpose of finding a basis for settlement, its recommendations for the most part being unacceptable to the labor organizations (JA 41).

The carriers then issued a promulgation of changes in working conditions to be imposed unilaterally

(Tr. 255, 2438-9, JA 120, Em. Exh. 7, pp. 142, 147, 150, 153, Tr. 2106, 2109). On each train, there is only one engineer and one assistant ("fireman"), operating and maintaining the entire assembly of locomotive power. (Tr. 2438-39, 2554, Em. Exh. 7, p. 140, Tr. 2106, 2109).

[7] There were also minority reports (Car. Exh. 8, pp. 189-271, Tr. 273, 279), including one by A. E. Zimmerman, Asst. Grand Chief Engineer of the Brotherhood of Locomotive Engineers, bound separately from the principal report.

(Car. Exh. 13, pp. 55-117, Tr. 273, 279). Litigation ensued and the parties were relegated to self-help. *Brotherhood of Locomotive Engineers* v. *Baltimore and Ohio Railroad*, 372 U.S. 284 (1963).

On April 3, 1963, pursuant to Section 10 of the Railway Labor Act, the President appointed Emergency Board No. 154 (JA 42). That board, impressed with the vitality and earning capacity of the railroads and the high productivity of its workers (Car. Exh. 13, p. 145, Tr. 273, 279), recommended that the question of retaining or eliminating jobs of assistants to engineers ("firemen") be resolved by negotiating a procedure for examining each category of job, with third party assistance where necessary, on the basis of the relationship of the category to the safety and burden of work of remaining employees (Car. Exh. 13, pp. 146-149, 152, Tr. 273, 279, JA 60-61). The carriers accepted this as a basis for negotiating an agreement (JA 133). Thereafter, the labor unions made a number of proposals to implement the recommendations of the Emergency Board and to reduce them to contract terms (JA 134, 166 *et seq.*). However, agreement was not consummated. Submission of the dispute to voluntary arbitration was proposed several times and rejected each time by the labor unions (JA 43)[8].

On July 22, 1963, President Kennedy sent to Congress a message recommending the enactment of a proposed bill to submit the dispute to the Interstate

[8] The position of the labor unions was that with all due respect to the persons from time to time proposed as arbitrators, the unions as a matter of principle could not accede to the delegation of their responsibilities to third parties; that they could not entrust the welfare of their members to unknown procedures without restriction (JA 155, 156).

Commerce Commission for settlement. At the suggestion of the Senate Committee on Commerce, the Secretary of Labor undertook a resumption of mediation. On August 2, 1963, the Secretary of Labor made a notable written suggestion for the settlement of the dispute, leaving parametric details to be worked out in subsequent bargaining and mediation (JA 140-8). The Secretary's suggestions represented a reduction toward contract language of matters previously suggested or agreed upon by the parties,[9] notably the recommendations of Emergency Board No. 154 (JA 133, 135).

In subsequent mediation, it became evident to the Secretary of Labor that the parties had accepted his suggested pattern of agreement (JA 133, 135). As reported subsequently by the Secretary of Labor (JA 137-138) the parties indicated agreement as follows:

> "(a) The principle of blanking a fireman (helper) job if, but only if, there is no fireman (helper) on the fireman (helper) seniority list available to fill a vacancy which develops, if filling the vacancy would require a new hire and if blanking the job will not unduly endanger safety or

[9] Petitioner claims that "agreement" as used by the Secretary of Labor and in Public Law 88-108 refers to an expressed or implied indication of acceptability of a proposed resolution of a matter in dispute, ready to be put into effect after working our acceptable resolutions on other points remaining in dispute. No binding legal effect is presupposed. "Tentative agreement" is taken to mean an experimental acceptance. "Agreement" is connoted by expressions or actions indicating that a proposed solution "would" be acceptable. "Tentative agreement" is connoted by expressions or actions that a proposed solution "might" be acceptable. In the context of bargaining, there is no agreement in a final, legal sense unless and until there is an entire executed, legally binding instrument.

unduly burden other employees was accepted by both parties. . . .

"(b) The principle that certain categories of jobs can be agreed upon in advance as not requiring case-by-case review to determine safety and undue burden (so that review is to be limited only to determination of whether a job falls in these categories) was recognized by both parties. . . .

"(c) There was mutual acceptance of the concept of making jobs other than those falling in the categories referred to in the preceding paragraph blankable only after agreement or Special Board review of any disputed safety and undue burden issue. . . .

"(d) There was mutual acceptance of the Special Board review procedure to cover individual cases. . . .

"(e) There was mutual acceptance of the principle of blanking jobs only in the order of a sequence of categories, with provision to be made to cover situations in which jobs become vacant in an order different from the order of the sequence. . . .

"(f) There was substantial acceptance of the principles of the 'employee job rights' provisions as set forth. . . .

"(g) The bilateral Joint Board suggestion was accepted by both parties (but with disagreement about the effect to be given its determination and with little discussion of details of its functioning)." [10]

The Secretary of Labor was in continuous communication with the Chairmen of the Senate and House Committees considering the proposed legislation.[11]

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[10] This concerned the development of policy following the expiration of the proposed agreement.

[11] S. Rep. No. 459, 88th Cong., 1st Sess., p. 7; 109 Daily Cong. Rec. 15277, 15283, August 28, 1963.

During the course of negotiation, agreement on the so-called "firemen" issue appeared to be so close that on August 6, 1963, following the submission by the engine service labor unions of a proposal which included specific numbers and terms entered in the blanks of the Secretary of Labor's August 2, 1963 proposal (Tr. 1790-4, 1800, JA 134, 200-7), the carriers and the Secretary of Labor insisted that there be convened the large group of union officials of the BLF&E who would be needed to ratify an impending agreement (Tr. 1800-1, JA 135). This was done (Tr. 1802). The BLE already had a committee in Washington with authority to conclude an agreement on all issues (Tr. 1799). The document which the carriers had in hand at the time they were insisting that the labor unions obtain authorization for the execution of an agreement "in view of the indications that the prospect of settlement was now very real" (JA 134-135) provided for all of the items of agreement listed above (Tr. 1791, 1795, 1797-8, 1800, JA 200 *et seq.*). The document provided for a limitation of 16 per cent on the number of "firemen" jobs to be eliminated (or a minimum of 84 per cent of the jobs to be retained) (JA 134-135, 204, Tr. 1872).

Within the time allotted, the parties failed to resolve their remaining differences and indeed, by August 12, the carriers had retreated to a degree from the high water mark of agreement which had been reached on August 6, 1963 (JA 134, 135, 136, 214). Thereafter the carriers again promulgated a unilateral imposition of the work rules changes they had originally demanded in their November 2, 1959 notices. The unions again gave notice of a peaceful withdrawal from service in the event of a unilateral imposition of work rules indicating, however, a willingness to continue essential

military and civilian transportation service with no personal compensation.[12]

On August 28, 1963 the Congress enacted Public Law 88-108 which differed from the bill recommended by the President in a number of respects, including the addition of the prescription in Section 3 that the Secretary of Labor furnish the Board memorandums on the bargaining and mediation results following his suggestions on August 2, 1963; that matters on which the parties "were" in agreement be incorporated in the award; and that due consideration be given in the award to matters on which the parties were in tentative agreement (*infra*, p. 3a).

Under Public Law 88-108 only the "firemen" issue[13] and the "crew consist" issue were referred to the Arbitration Board for settlement; the "other" issues, including all the demands of the labor unions, were referred to further bargaining (*infra*, pp. 3a-4a).

Proceedings Before Arbitration Board No. 282

Pursuant to the provisions of Public Law 88-108, the Arbitration Board consisted of three neutral members and of four partisan members.

The chairman of the board announced at the opening of the hearing the manner in which it would proceed

[12] Hearings before Senate Committee on S. J. Res. 102, 88th Cong., 1st Sess., p. 465.

[13] *I.e.*, the dispute over how many and which categories of assignment locomotive engineers would have to work without an engine service assistant. The additional problems concerning compensation, if any, for some displaced assistants and job rights for some individuals were not part of the November 2, 1959 or September 7, 1960 notices and were not the subject of a dispute that could have threatened the emergency to which Public Law 88-108 was addressed.

Tr. 6-7). No provision was made for framing the issues and over the objection of the petitioner the board followed the policy of admitting irrelevant and cumulative materials.[14] No provisions were made for surrebuttal or for closing arguments or for briefs. No provision was made for submitting proposed findings and order for review or comment by the parties.[15] Petitioner objected to the Board that it could not meet issues without knowing what the issues were (Em. Reb. Exh. 10, pp. 1-3).

The Award of Arbitration Board No. 282.

The award of Arbitration Board No. 282 was signed by the three neutral members and concurred in by the two carrier members; the two union members dissented. There was no opinion, or findings of fact, issued by the majority of the board. There was, however, an opinion signed and issued by the three neutral members of the board in which there was no concurrence. Their opinion contained no findings of fact on the record, the neutral members having stated (JA 54-55):

> "We shall not attempt to summarize in this opinion the considerable body of evidence introduced by the parties. It would be impossible to do do so within manageable limits without paraphrasing or omitting references to many matters which the parties deemed important; such an attempt as is evident from the organizations' reaction to the report of the Presidential Railroad Commission, would only lead to misunderstanding and resent-

[14] See, for example, Tr. 274-9, 1322-7, 1341-1352.

[15] Provision was made for the submisison of written statements of rebuttal subject to no further testing (Tr. 6, 4694-8). Petitioner objected by letter to the board dated November 9, 1963, which is included in the origianl record here.

ment. In our judgment the substance of the parties' presentations to us is essentially the same as that referred to in the Commission's report, and no useful purpose would be served by our covering the same ground again in this opinion.[16]

The neutral members' opinion was self-critical of the validity and usefulness of the award in terms of limitations of time, experience, and legislative context (JA 32-3, 61-2). In respect to the principal matter in dispute—the number and character of the jobs of assistants to locomotive engineers ("firemen") that were to be eliminated or retained—the neutral members in practical effect, repudiated the basis of Sections 1, 3 and 7 of the Act and of the Secretary of Labor's memorandum to the board pursuant to Section 3, stating (JA 50, 52, 61):

> "With regard to the treatment of firemen's *jobs* we have found next to nothing in the way of agreement that could serve as a meaningful foundation for our award.
>
> * * *
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> "* * * we have found no substantial structure of agreement on which we could base our award concerning the proposed elimination of firemen's jobs. * * * In treating the *job* phase of the issue, then, we have had no alternative but to start from scratch, studying the evidence as to the duties and functions of firemen, drawing our own conclu-

[16] It is always easy to sympathize with a desire to avoid criticism. Perhaps, however, the neutral members of Arbitration Board No. 282 were unduly sensitive on this occasion; in the light of their well-established and well-deserved reputation for integrity, earnestness and ability, they would have less to fear from the reaction to a sound documented exposition of findings to support their conclusions than from an expression of distrust of the reactions likely to be encountered in making such a rational approach. In any event, sensitivity to criticism is not a substitute for due process.

sions as to the general need for firemen on locomotives that do not use steam power, and attempting ourselves to develop a practical system of determining which jobs, if any, may be eliminated.

* * *

"Our conclusion is that although the memorandum provided the focal point for their negotiations and in that sense may be said to have brought about a narrowing of the issues, the parties remained in hopeless disagreement on the crucial questions of the numbers and types of jobs on which firemen need no longer be employed, and the sequence and methods of their removal from service." (Emphasis as in original).

While not challenging the Secretary of Labor's report that the parties had accepted the principles of categories and sequences of jobs (as suggested originally in rudimentary form by Emergency Board No. 154 whose report both parties had received favorably and finally in form approaching contract language on August 2 and 6, 1963), the neutral members preferred to "start from scratch" and to devise a solution of their own invention (JA 50, 52, 54). Their solution, concurred in by the carrier members of the board, was to give each carrier the right to list for extinction, in each seniority district, all engine crew assignments which in the carrier's judgment, based on the carriers' own "considerations of safety, undue work burden,[17] and adequate and safe transportation service to the public" do not require the services of a "fireman", with the local chairman representing the locomotive engineers' engine service assistants ("firemen") having the right thereafter to save some jobs based on his own "considera-

[17] This obviously refers to safety and undue work burden of employees remaining after the assistant's jobs are discontinued.

tion of safety, undue work burden and adequate and safe transportation service to the public" (JA 12, 13). The limitation of the number of jobs that could be saved was fixed uniformly at not more than ten per cent for each seniority district (JA 13). No provision was made for supervising or checking the determinations of the carriers and the local chairmen representing the locomotive engineers' assistants. Without explanation, the award eliminated the representatives of the locomotive engineers from further participation in the creation or modification of agreements concerning the composition of engine service crews. The award did not provide for any degree of participation by the locomotive engineer's representatives in deciding which ten per cent of the jobs should be retained to protect him, as the remaining employee, against hazards and undue burden of work.

Without explanation, the award sharply curtailed existing seniority rights of retained employees, even those with more than ten years' seniority (JA 19).

Without explanation, the board introduced into the award other terms and conditions very much harsher in effect on the employees than had been demanded by the carriers, e.g., the use of a single job offer to eliminate a succession of men from the employment rolls of successive seniority districts (JA 16-8, 271Y-Z).

With respect to the key question of how many and which assignments locomotive engineers should operate without engine service assistants it is uncontradicted that the award in no way reflects any matters on which the parties were in agreement, or in tentative agreement, or on which they had narrowed the areas of disagreement or any matters relating to extent of agreement set forth in the Secretary of Labor's memoran-

dum furnished to the board pursuant to Section 3 of the Statute. It is uncontradicted that the solution specified in the award is completely an invention of the board.

Proceedings in the Courts Below

Under the provisions of Section 9, Third, of the Railway Labor Act (45 U.S.C. § 159), the Declaratory Judgments Act (28 U.S.C. § 2201 *et seq.*), an Act conferring jurisdiction in cases arising under statutes regulating commerce (28 U.S.C. § 1337), the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*, 60 Stat. 237), and the Constitution of the United States, a petition and complaint were filed (Civil Action No. 2921-63) in the United States District Court for the District of Columbia on December 3, 1963 seeking impeachment and vacation of the award,[18] a declaratory judgment and injunction against the carrier parties to the dispute and the board (JA 27-P, *et seq.*). On December 18, 1963 the court granted the unopposed motion of the United States to intervene as a defendant (JA 3).

Petitioner's attack on the award and on the statute under which the award was issued was based on the following grounds: That the redelegation by the board of statutory responsibility and authority was illegal (JA 27-R, 27-U); that the award of the board did not conform and confine itself to the statutory prescription and limitation in that, among other things, it nullified and discarded the basic statutory scheme to preserve, prefer and utilize the results of collective bargaining and mediation

[18] The award had been filed in that Court under Docket Misc. No. 41-63.

(JA 271V-Z, 271Z3-271Z4, 271Z7-271Z8); that the proceedings before the board were lacking in due process in numerous respects including the failure to afford petitioner an opportunity to meet the issues by the absence of proposed findings and order (JA 271Z3), failing to make findings of fact (JA 271Z, 271Z4), and relying upon nonexistent or inapplicable conclusions of other nonbinding boards (JA 271V, 271Z5-271Z7); that to the extent that Public Law 88-108 is construed as intending or permitting Arbitration Board No. 282 to do what it had done in its proceedings and in its award, the statute is invalid as constituting an improper and unrestrained delegation of legislative power and depriving petitioner of due process of law (JA 271Z, 271Z10); and that the award unconstitutionally denied employees the right to bargain collectively (JA 271U, 271Z10).

Cross motions for summary judgment were filed on January 2, 1964 and a hearing on the motions was held in the district court on the same day (JA 4).

The decision of the district court was announced in an opinion by Judge Holtzoff on January 8, 1964 (JA 368) and an order was entered on January 10, 1964 (JA 394) denying the motion of plaintiff and granting those of the defendants.

The district court rejected as a contention "entirely lacking in merit" the complaint concerning redelegation to the carriers and local chairmen of the organization representing locomotive engineers' assistants ("firemen"), comparing the redelegation to a reference by a court to a special master (JA 384). As to the exclusion of representatives of the locomotive engineers from any participation, the decision was silent.

The district court held that Section 3 did not require the board to incorporate in its award matters on which the parties were in agreement (JA 381) and further that "agreement" in Section 3 refers only to binding commitments (JA 382).

The decision characterized the neutral members' opinion as the board's opinion (*ibid.*) and their conclusions as findings of fact by the board (JA 383).

The court held the Administrative Procedure Act inapplicable and did not refer to other questions raised concerning administrative due process (JA 379).

The permitted scope of judicial review was held to be "exceedingly limited and narrow", "much narrower than that which generally prevails in connection with administrative decisions" (JA 378-379).

The district court also found that compulsory arbitration is not a far-reaching innovation (JA 389), that the standards of the statute were sufficiently adequate (JA 391), that the constitutional issues raised were insubstantial (*ibid.*), that injunctive relief would be surplusage (JA 386), and that a three-judge court was not required to be convened (JA 391).

In the Court of Appeals petitioner sought a reversal of the order of the district court on substantially the same grounds that were used at the district court level in attacking the award and the statute under which the award was made (R. 415; 437-440, 459, 476-478, 669-670).

In a per curiam opinion (pp. 25a-27a, *infra*), with Judge Wright dissenting from the holding that no substantial constitutional issue had been raised and

that a three-judge court was not required (pp. 27a-28a, *infra*), the Court of Appeals affirmed and adopted the district court's decision (p. 27a, *infra*).

REASONS FOR GRANTING THE WRIT

I. The unprecedented questions of constitutional law and federal statutory law in this case require resolution by this Court for the protection of the rights of the more than 200,000 workers who run the Nation's trains, and for the protection of the basic freedom of our system of labor relations.

A. The concept of federal compulsory arbitration, as developed and approved below, brings into question the applicability of fundamental constitutional doctrines in an important and hitherto untested area.

The belief is widely held that this Nation faces a growing social crisis arising from the myths and evolving realities of man's use of his technology. National policy is essential as a prerequisite to the use of federal compulsion in this area. Our system of law does not sanction the development of such policy on an *ad hoc* but compulsory basis by partisan bodies having no responsibility to the electorate. Policy, in this critical area, as in any other area affecting the commerce and general welfare of the country, is for Congress to formulate. Only the function of implementation of national policy may be delegated, and then only by due process within the framework of standards.

What is involved in this case is a statute and a proceeding which—under the stress of a potential emergency in essential transportation services—attempts a short-cut solution to the formulation and application

of policy, a solution that at every key point abridges, to an extent shockingly in excess of anything required to deal with the threatened emergency, the basic legal and human rights that workingmen, along with others, enjoy in a free society. The holdings of the court below are based on the theory that a process bearing the style and title of "arbitration" is as free under public law to create policy binding on parties disputing over their future interests as a voluntary arbitration might be in creating policy for the content of contractual relationships. Under this theory, the court below has justified the compulsory determination, in broad scope, of what the *interests* of American workingmen *should* be. On the same theory, the court below has justified the making of such a determination on the basis of the economic and philosophical predilections of an *ad hoc* group of selected disputants and neutrals rushing through a hearing lacking essential elements of due process in order to meet a close statutory deadline (JA 374, 377). It is unchallenged that on key questions in dispute this compulsory determination owes nothing whatsoever to any statutory statement of policy and of standards.

If this case were to stand in its present posture, it would constitute an example and invitation to substitute public relations and political relations for labor relations. Once compulsory arbitration, without policy and standards laid out by Congress adequate to govern the result, is offered as a prize to a party achieving a deadlock, then working conditions will depend less on the merits disclosed in collective bargaining than on the resources devoted to the cultivation of a public image.[19]

[19] The availability of compulsory arbitration "in some sort of application of Parkinson's Law to industrial relations, both guarantees the use of the process and the extension of its use to

Only the constructive intervention of this Court can prevent this case from casting an ugly and menacing blot on a system of law under which the American worker may live his working life in dignity and freedom. Only the constructive intervention of this Court can turn the trend away from the shallow and illegal solutions that promise to make labor relations as dependable as Mussolini's trains. There is no greater need today in the field of labor relations than a new incentive to bargain. The decision of this Court in this case can restore bargaining incentive in the railroad industry and can assure its continued existence in American industry generally.

And, if bargaining were still to fail in this industry, Congress could deal with any resulting emergency in a number of ways which do not countenance the illegal delegation and redelegation of legislative authority and the abridgement of due process.

B. Earlier instances of approved regulation, relied upon below (JA 388-391), are sharply distinguishable from that involved in this case. In *Wilson* v. *New*, 243 U.S., 332 (1917), for example, Congress enacted a simple limitation on the hours of a normal day's work. This was done by Congress directly, and in an industrial context from which Congress could draw its logical and reasonable conclusion regarding appropriate policy. In the instant case, of course, no one

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new areas * * * grievance arbitration experience may not be used as a guide to likely experience under compulsory arbitration of new contracts. For in grievance arbitration, guides exist for negotiation and a concession on one point does not endanger gains elsewhere." Benewitz, Maurice C., Grievance Arbitration Experience as a Guide to Compulsory Arbitration Expectations, 14 Lab. L. J. 790, 791 (September 1963). See also: R. W. Fleming, 'The Search for a Formula', in I. Bernstein, H. L. Enarson, R. W. Fleming (eds), Emergency Disputes and National Policy, New York, Harpers & Bros., 1955, pp. 211-213.

has yet provided any simple figure or simple context; what is involved is the prospective relationship between contending parties, the creation of a quasi-agreement which will govern that relationship in quite complicated detail over a term of years. Perhaps even more decisive is the difference in the source of the policy to be applied. In *Wilson* v. *New*, that source obviously was the Congress; in this case, that source, as Public Law 88-108 has been construed and applied, is the *ad hoc* arbitration board, whose award on the key issue of which runs and assignments locomotive engineers would be required to operate without engine service assistants derived no aid from such prescriptions of policy and standards as were laid out in a statute.

The courts below adopted the view, which was urged by respondents below, that compulsory arbitration was not a far-reaching innovation, since "compulsory arbitration" for "minor disputes" under the Railway Act went as far back as 1926 (JA 389). But there is a vast difference between a determination of what the parties mean in an agreement of their own making and a determination of what kind of agreement the parties should make.[20] What large area of discretion is involved in the functions of ascertaining the intended interpretation or application of existing agreements, or

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[20] "The arbitrator in grievance proceedings performs a judicial function—he interprets and enforces an existing contract. * * * In interest arbitration, on the other hand, the arbitrator performs a legislative act—he creates the contract. A dispute over contract terms is non justiciable." The Peaceful Settlement of Disputes Over Contract Terms in Symposium: Arbitration and the Courts, 58 N.W. U.L. Rev. 466, 559 (Sept-Oct, 1963). For cases so holding see *Boston Printing Pressmen's Union* v. *Potter Press*, 1st Cir., 1957, 241 F. 2d 787, certiorari denied, 355 U.S. 817; *Austin Mailers Union* v. *Newspapers, Inc.*, 5th Cir., 1963, 55 L.R.R.M. 2693, 2694; *Matter of Buffalo and Erie Ry. Co.*, 250 N.Y. 275, 278-279, 165 N.E. 291, 292 (1929).

the determination as to what the existing practices on a railroad are? It is nothing less than shocking to equate this with the revolutionary development of compulsory arbitration to decree what interests shall be served, what rights are to be created or abridged or denied.

II. Public Law 88-108, as the first federal statute providing for compulsory arbitration of the prospective interests of disputing parties, was construed and applied in the award of Arbitration Board No. 282 and by the courts below, in a manner which resulted in a massive obliteration of bargaining rights and property rights in contravention of due process.

A. The power of Congress to deal with a national emergency is not at issue here. The existence of an emergency was declared by the Congress, and petitioner is aware that it would be unavailing to argue that the congressional conclusion was by no means inevitable. Petitioner has not raised, here or below, any question as to the power of the Congress, if properly exercised, to prevent a national stoppage of commerce by rail. And within very broad limits petitioner is not disposed to question Congress' right, in responding to the exigencies of the situation, to choose a new, untried, and drastic remedy.

However, in choosing compulsory arbitration as a remedy, Congress could not escape the requirements of due process under law, and it could not simply turn over to other and private hands the formulation of a policy and of standards within which a settlement of the dispute was to be had. The designation of a process as "arbitration" has no talismanic effect on the applicability of Article I and the Fifth Amendment to the Constitution, and statutory protections.

No claim of emergency can alter the fact stated by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 589 (1952): "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

B. The award constituted an unconstitutional exercise of legislative power. Public Law 88-108 provided for revolutionary social innovation where standards could not be derived from historical, known, or practical context. As construed by the courts below, the statute failed to supply sufficiently explicit standards to prevent the exercise of a range of discretion which is the equivalent of legislating. Such a delegation without standards stands condemned as unconstitutional by this Court's decisions in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430 (1935); *Schechter Poultry Corp* v. *United States*, 295 U.S. 495, 529-542 (1935). Compare *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Arizona* v. *California*, 373 U.S. 546, 626-627 (1963), opinion of Mr. Justice Harlan, dissenting in part. The *Panama* and *Schechter* cases have been followed by state courts to hold unconstitutional state laws providing for compulsory arbitration of labor disputes without legislative prescription of adequate standards. *Van Riper* v. *Traffic Tel. Workers' Fed. of New Jersey*, 2 N.J. 335, 66 A. 2d 616, 9 A.L.R. 2d 854 (1949); *Transport Workers Union* v. *Circuit Judge*, 322 Mich. 332, 348, 34 N.W. 2d 71 (1948); *State ex rel. Everett Fire Fighters* v. *Johnson*, 46 Wash. 2d 114, 278 P. 2d 662 (1955). In each of the cases upon which the courts below relied (JA 390-391), Congress has used words which in their historical, known, or practical context, provided policy and standards to govern the exercise of the delegated authority. . .

C. The degree of interference with the parties permitted by the statute, as construed and applied, was grossly disproportionate to the occasion. An *ad hoc* group, exercising governmental power, was permitted to intrude in a plenary manner into the area of determination and prescription of the interests of private parties engaged in a labor dispute. The degree of intrusion on key issues in dispute—in departing completely from the pattern of interests which had been emerging from the history of bargaining and mediation—was, in every practical and legal effect, without restraint. There was no assessment of the severity of the injuries caused private parties, notably the petitioner, against that which would be sufficient to protect the public interest.

Labor unions and their members depend on the potential exercise of economic self-help both to improve their existing conditions and to ward off attempts to degrade existing conditions. On its face, it is unconscionable and confiscatory to ask labor unions, in the national interest, to lay down their basic weapon and then to impose upon those unions and their members terms and conditions of employment very much inferior to those previously available to them in the course of realistic bargaining and mediation.

When the carriers themselves thought that they were close to an agreement with the petitioner, the parties were talking about a designation of some 16 per cent of the total number of assignments on which engineers would be required to run without an engine service assistant (JA 134 and 204). When the compulsory arbitration board came up with its award "from scratch" that 16 per cent had risen to 90 per cent or more!

Likewise the negotiations at the time when the carriers themselves believed the prospect of settlement to be very close had not involved any mention of the exceedingly mischievous and damaging provision contained in the award whereby one undesirable job offer could wipe out seniority list after seniority list (JA 17-18). Nor did the negotiations at the time that the carriers themselves believed a settlement to be very close, contemplate the castration of existing seniority rights, built up through the years, as was dictated by the award (JA 19-20). In these and other respects, the award failed to maintain or restore the employees to anywhere near the position they had before they were compelled to forego economic self-help out of consideration for the public interest. Thus the result of the operation of the statute, as construed and applied by the board and the courts below, is so remarkably disproportionate to the requirements of the occasion —emergency or not—as to constitute a grave infringement of rights and property without the protection of due process.

D. The compulsory arbitration board invalidly and unfairly redelegated statutory responsibility and ousted petitioner from its statutory obligation and authority to represent employees in collective bargaining over the creation and modification of their working conditions. It also deprived locomotive engineers of the right to be represented in collective bargaining over their own working conditions by representatives of their own choosing, contrary to the intent of Section 2, First, Second, and Fourth of the Railway Labor Act, which were not repealed by Public Law 88-108.

It must be presumed that in enacting Section 2 of Public Law 88-108, providing for the naming of three

neutral members of the arbitration board by the parties themselves, or, failing that, by the President of the United States.[21] Congress contemplated that the functions entrusted by it to the board would be carried out by responsible identifiable individuals of unquestioned character and of unquestioned neutrality. It is incredible to presume that Congress or the President of the United States would turn over the important matters comprehended in the statutory resolution of the nationwide work rules dispute to some thousands of unknown individuals, with contending interest in the matter; utilizing standards of their own making and applying these standards to the question of safety and adequacy of service to the public and to the interest of employees whose representatives are barred by the award from participating in the redelegation of authority. This is indeed delegation and redelegation with vengeance and it is precisely what the award of the compulsory arbitration board provides (JA 12-14). This was done without instructions, without clarifying definition and interpretation, without providing for supervision or check, and without explanations of any kind for the exclusion from the whole process of the locomotive engineer, the very employees whose safety and burden of work are most at stake when he remains on the engine that, for the first time, he must operate without an engine service assistant.[22] The result, under the award, is that the subdelegees

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[21] In this instance it was the President who made this selection (Bd. Exhs. 2A, 2B; 2C, Tr. 4).

[22] (Em. Exh. 24, p. 1, Tr. 2435, 2442; Em. Exh. 27, p. 2, Tr. 2447, 2494; Em. Exh. 29, pp. 3-17, Tr. 2503, 2547; Em. Exh. 30, pp. 3-16, Tr. 2503, 2548; Em. Exh. 34, p. 5, Tr. 2503, 2582; Em. Reb. Exh. 12, p. 4; Em. Reb. Exh. 14, pp. 38-40; Car. Exh. 8, pp. 214-220, 223-4, Tr. 18, 273, 279).

may exercise authority under the award without submission to the mandates of equality and liberty which must bind every group exercising a public function. *Nixon* v. *Condon*, 286 U.S. 73 (1932). See also *Edwards* v. *Capital Air Lines*, 176 F. 2d 755 (App. D.C., 1949), certiorari denied, 338 U.S. 885, dealing with award made by a board whose interests were in conflict with those to whom the award would apply.

E. Nowhere in the award or in the opinion of the neutral members is there any indication, by way of finding or conclusions, that seniority districts, numbering more than one thousand over the country, are substantially uniform in operating characteristics and in manpower utilization. The opinion of the neutral members itself discloses that they are of a contrary view. They assert that sufficient knowledge upon which to base standards of safety and adequacy of service and burden of work can be obtained only by first-hand observation on the property of each of the carriers involved in the case (JA 62-63). The neutral members determined that there is need for the continued employment of some locomotive engineer's engine service assistants ("firemen") in order to prevent excessive safety hazards to lives and property, to avoid imposing an undue burden for the remaining crew members and to insure safe and adequate transportation service to the public (JA 28). These considerations are substantially affected from place to place by highly variable conditions, *i.e.*, the character of terrain, visibility, speed, hours on duty and mix of work; the number of units of power and number and disposition of various types of cars in the consist; traffic density on and across the rails; character of protective devices and communicating systems; type, age

and condition of equipment and roadway, nature of inspection procedures; number and experience of train crew members; management policy and practice, as in encouraging observation or violation of speed restrictions and other rules; and a host of other factors.[23] The petitioner had no hint that the board was considering a uniform across-the-board abolition of firemen. The petitioner therefore never had the opportunity to demonstrate to the board that such a solution is irrational. The failure of the board to provide the parties with the opportunity to see and comment upon proposed findings and a proposed order is of tragic consequence in this connection. Lives and limbs, the public's, as well as the employees', are jeopardized by this procrustean approach.

This unfortunate but basic component of the Board's award is so irrational, arbitrary, and oppressive as to contravene due process.

F. The partisan, nonrepresentative composition of the board, the insufficiencies and irregularities of the proceedings leading to the award, and the restriction as to the scope of judicial review of the award, all upheld in the court below, resulted in deprivation of due process of law. Arbitration Board No. 282 was an agency exercising quasi-legislative and quasi-judicial functions. It consisted of seven persons, a majority of whom had interests in the outcome of their proceedings. Quasi-judicial or quasi-legislative action by such a body is lacking in due process. *Carter*

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[23] (Em. Exh. 7, pp. 141-143, 148-150, 154-156, Tr. 2106, 2109; Em. Exh. 28, pp. 3-10, Tr. 2447; 2494; Em. Exh. 38, pp. 1-3, Tr. 2538, 2609; Em. Exh. 42, pp. 1-2, Tr. 2539, 2604; Em. Reb. Exh. 13, p. 3; Em. Reb. Exh. 22, pp. 1-2; Em. Reb. Exh. 24, p. 2; Em. Reb. Exh. 26, p. 2.

v. *Carter Coal Co.*, 298 U.S. 238, 310-311, 318 (1936); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935); *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 656-660, 295 N.W. 346, 351-352 (1940); *Group Health Ins.* v. *Howell*, 40 N.J. 436, 444-445, 193 A. 2d 103, 108 (1963); *Becker* v. *State*, 7 W.W. Harr., Del. 454, 185 Atl. 92, 100 (1936); *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners*, 40 Calif. 2d 486, 254 P. 2d 29, 36 (1953); *Sunbeam Corp.* v. *Richardson*, DC WD Ky., 144 F. Supp. 583, 591 (1956).

No findings of any kind were made by a majority of the compulsory arbitration board. Three members of the Board concurred in one opinion, two members of the board concurred in the other and two members of the board had individual statements of opinion. Inasmuch as due process requires findings of fact by the body making an administrative decision the award is fatally defective. *Panama Refining* v. *Ryan*, 293 U.S. 388, 432 (1935). Further, no findings were made even by the neutrals to cover the issues essential to the order. This is also fatally defective as lacking due process. *Florida* v. *United States*, 282 U.S. 194, 215 (1931); *ICC* v. *Mechling*, 330 U.S. 567, 582-583 (1947); *Colorado-Wyoming Co.* v. *FPC*, 324 U.S. 626, 634 (1945); *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488, 489 (1942); *Best Foods, Inc.* v. *United States*, Customs Ct., 3d Div., 218 F. Supp. 576, 582-583 (1963). Findings will not be implied from the result. *United States* v. *B&O Railroad Co.*, 293 U.S. 454, 462-465 (1935). Nor will the court sustain an award which could have been supported by proper findings but was not. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 93-94 (1943).

The board did not provide as a matter of policy for the exclusion of irrelevant and immaterial and unduly

repetitious evidence as is required both by due process of law and by Section 7 (c) of the Administrative Procedures Act (5 U.S.C. § 1001 *et seq.*).

The neutral members made use of the PRC report in an improper manner (BA 59). The PRC was a nonstatutory body, which did not conform to such legal standards in its hearing as swearing witnesses or framing issues. Reliance by the neutral members on that commission's fact findings therefore, in the context of the type of consideration of the facts afforded by the Arbitration Board, denied due process. See *Harmon* v. *Brucker*, 355 U.S. 579 (1958); 20 Am. Jur. Sec. 686, pp. 578, 579; Sec. 695, p. 586, and cases cited.

The neutral members also cited in their opinion as one fact leading them to their "findings and conclusions", their belief that Emergency Board No. 154 had concluded that in most instances firemen are not required in road freight and yard service and that in addition several emergency boards and one arbitration board in this country ruled generally the same way (BA 56-57). There is nothing in the report of Emergency Board No. 154 which expressly or by fair implication resembled the conclusion attributed to it by the neutral members of Arbitration Board No. 282. Likewise no proposal which contemplated the removal of engine service assistants from road freight and yard service was ever passed on by any emergency board or arbitration board other than Emergency Board 154 and the so-called Arbitration Board No. 282. That the neutral members relied in part on a nonexistent conclusion of the Emergency Board No. 154 constitutes a deprivation of due process.

The holding of the courts below (JA 378-379) that petitioner was not entitled to an independent judicial

review also denied petitioner due process. *St. Joseph Stockyards* v. *United States*, 298 U.S. 38, 51-52 (1936).

III. This case presents important issues of statutory construction which should be decided by this Court. The construction and application of Public Law 88-108 by Arbitration Board No. 282, as upheld by the court below, rendered nugatory the manifest intent of the statute to preserve, prefer and utilize the result of collective bargaining efforts; to complete a pattern of bargaining which the parties had almost completed themselves (JA 134-135). In directing that matters on which the parties were found to be in agreement be incorporated in the board's award, Congress had reference to a real situation, the bargaining and mediation status of the key issues in the dispute under the parties' notices, notably the question of which assignments locomotive engineers might henceforth be required to work without an assistant ("fireman") (S. Rep. 459, 88th Cong., 1st Sess., p. 10; H. Rep. 713, 88th Cong., 1st Sess., pp. 9, 14.) That bargaining and mediation status, as viewed by the committees in charge of the legislation was not a hopeless one; the parties appeared to the committee to be fairly close to settlement of the key issues (*ibid.*) Under these circumstances, Congress could not have regarded as useless the structure of agreement which the parties had been approaching (JA 133, 134-135, 200 *et seq.*).

Congress directed the Secretary of Labor, who was mediating with the parties and, at the same time, consulting with the Congressional committees drafting the legislation (S. Rep. 459, 88th Cong., 1st Sess., p. 7; H. Rep. 713, p. 3), to provide the details of the bargaining and mediation status so that the compulsory arbitration board could adopt what the parties had

already come to and then fill in the gap to complete the structure (H. Rep. 713, 88th Cong., 1st Sess., p. 14; 109 Daily Cong. Rec. 15277, 15292-15293, August 28, 1963).

This intention was frustrated in the award's completely new solution for the key issue of engine service manning. In respect to this issue, the award could have come to the same result in the absence of any legislative prescription or admonition to make any use whatever of the previous bargaining of the parties or the mediation results achieved by the Secretary of Labor.

In thus nullifying the provisions of the statute, the board and the courts below construed out of existence the requirement in Section 3 of the statute that matters on which the parties were in agreement be incorporated in the award. The courts below upheld a construction that left the board free not to incorporate matters on which there was agreement (JA 382).

Further the term "agreement" was itself given a self-defeating construction by the neutral members of the board. According to their interpretation the term "agreement" used in Section 3 of the Act connoted a meeting of the minds having the consequence of a binding commitment (JA 49); this was also the construction which appealed to the courts below (JA 353). However, the word "agreement" is often used to mean no more than concord, the union of two or more minds or a concurrence of views and intention without legal consequences. *Sage* v. *Wilcox*, 6 Conn., 81, 85 (1826) cited in 1 Corbin on Contracts (1963), p. 20, n. 14. It is only this popular, nontechnical use of the term which could have been intended by the Con-

gress; on August 28, 1963 the date of enactment, the bill was passed precisely because no agreement had been or, prior to a complete settlement, could have been reached in a technical, legal sense (JA 353-356).

This Court held in *NLRB* v. *Radio & Television Engineers Union*, 364 U.S. 573 (1961), that an administrative agency is without power to avoid following the plan of the statute which it administers even though it may decide that the plan is unsound or unwise. It would be incongruous to permit an exemption from this salutary rule of law in the case of an *ad hoc* compulsory arbitration board.

The cardinal principle of statutory construction which should have been applied in this case, and was not, is to save and not to destroy. A reasonable construction would have given effect to all provisions of the statute; the construction adopted by the board and by the court below renders every provision of the statute dealing with collective bargaining and mediation merely redundancies. A ruling by this Court is needed on the question of whether the courts below were correct in permitting the *ad hoc* compulsory arbitration board that latitude of construction of its statutory obligations and limitations.

IV. The exercise of this Court's supervisory power is needed in this case to require compliance in the courts below with 28 U.S.C. § 2282. The single-judge district court was without jurisdiction to decide an action for interlocutory relief against the enforcement and operation of an unprecedented compulsory arbitration statute (Public Law 88-108) where such action was based on the repugnance of the statute to the Constitution of the United States. The departure

from the required convening of a three-judge district court was sanctioned by the court below. On this point, reference is made to the arguments presented in the Petition for a Writ of Certiorari in No. 935, pp. 15 *et seq.*, which arguments are adopted for this case.[24]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[24] The district court was mistaken in attributing to petitioner the expression of a view that 28 U.S.C. § 2282 is inapplicable to this case (JA 329, 386, R. 668).